

1 COMMONWEALTH OF PENNSYLVANIA: IN THE COURT OF COMMON PLEAS  
2 : OF DAUPHIN COUNTY, PENNSYLVANIA  
3 VS :  
4 TYSHAUNT LOVE : No. 937 CR 2002  
5  
6  
7

8 TRANSCRIPT OF PROCEEDINGS  
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11

12 BEFORE: HONORABLE BRUCE F. BRATTON  
13 DATE: Thursday, November 4, 2010  
14 PLACE: Courtroom No. 5  
15 Dauphin County Courthouse  
Harrisburg, Pennsylvania  
16  
17  
18

19 APPEARANCES:

20 JASON E. McMURRY, Esquire  
21 Office of the District Attorney  
22 For - Commonwealth

23  
24 JUSTIN J. McSHANE, Esquire  
25 For - Defendant

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**1                   PROCEEDINGS**

3                   THE COURT: My recollection is Mr. Muller  
4    was on the stand the last we broke or are we  
5    completed with his testimony?

6                   MR. McSHANE: No, Your Honor. May we  
7    approach on a witness related issue?

8                   THE COURT: Sure.

9                   (A discussion is held at sidebar off the  
10 record.)

11                  THE COURT: Mr. Muller, I don't think we  
12 need to swear you in again. You know you're  
13 still under oath.

14                  THE WITNESS: I do, Your Honor.

15                  MR. McSHANE: May I continue, Your Honor?

16                  THE COURT: Absolutely.

18                  DIRECT EXAMINATION (cont'd)

20                  BY MR. McSHANE:

21                  Q    We had talked about your role in the  
22 Tyshaunt Love case before and just because we had  
23 an appreciable delay here, you were lead counsel  
24 of course.

25                  A    Correct.

1    there were any disputes between either trial  
2 strategy, witness preparation, investigation,  
3 presentation or argument, you being the lead  
4 counsel, you would -- you would trump his  
5 concerns; is that fair?

6                  **A    I don't know if I would say trump. I  
7 mean --**

8                  Q    What would you say?

9                  **A    I don't recall disagreements, you know,  
10 in this case between either Mr. Giunta and myself  
11 as to how the case was going. We were both  
12 reviewing it. We both talked about it. I don't  
13 recall any single incident where Mr. Giunta said,**

14                  **oh, I think we should do this and I said, no, I  
15 don't think we should do this.**

16                  **I guess ultimately if there had been an  
17 issue where he felt strongly one way and I felt  
18 strongly the other way, as a senior attorney my  
19 decision would probably hold out. I just don't  
20 recall that being the situation in this case.**

21                  Q    In terms of the preparation and the  
22 investigation and even the presentation, is it  
23 fair to say and to characterize that you had more  
24 experience in this type of case than your  
25 cocounsel did at this point in time?

1                  Q    In terms of the strategy that was  
2 involved in the arguing of this case and the  
3 presentation of this case, the investigation of  
4 this case, for lack of a better way of putting  
5 it, the buck stops with you; is that fair?

6                  **A    More or less. It was little more  
7 collaborative than that but ultimately, yes.**

8                  Q    You had cocounsel in this particular  
9 case, correct?

10                 **A    Yes.**

11                 Q    And was that cocounsel of record,  
12 meaning, entry of appearance? Do you recall?

13                 **A    I don't recall. I mean, it would have  
14 been procedure to do that at least when it came  
15 to trial so cocounsel wasn't put somewhere else  
16 because he wasn't listed on this.**

17                 Q    In terms of your best recollection based  
18 on your habit and routine, the other attorney was  
19 Attorney Giunta, correct?

20                 **A    Yes.**

21                 Q    So in terms of the preparation of this  
22 case, you said it was a collaborative effort  
23 between the two you of, fair?

24                 **A    Pretty fair.**

25                 Q    And in terms of ultimate decisions if

1                  **A    At that point, yeah.**

2                  Q    I would like to talk to you about  
3 decisions that you had to make in this particular  
4 case involving trial strategy and get your  
5 interpretation of what occurred, and I have a  
6 power point presentation that I would like to use  
7 as demonstrative evidence. Are you in a position  
8 where you can see the screen?

9                  **A    Mr. Love may have to move.**

10                 Q    How about now?

11                 **A    Depends what you put up there.**

12                 Q    If you can't see it, then let me know.  
13                   (Whereupon, a Power Point presentation is  
14 produced and marked for identification as  
15 Defendant Exhibit No. 46.)

16                 BY MR. McSHANE:

17                 Q    The first decision you had involved  
18 around possibly of calling a witness by the name  
19 of LaQuan Williams. You're aware who he was?

20                 **A    I believe we discussed that the last  
21 time.**

22                 Q    Placing in front of you what has been  
23 marked as Defendant Exhibit No. 46 and the lower  
24 right-hand corner, do you see that so marked?

25                 **A    Okay.**

1 Q And it is marked that way for  
2 identification purposes. Do you see that?

3 A Yes.

4 Q And it is pretty much a true and faithful  
5 copy we see in front of you and in front of the  
6 Court here in terms of the power point; is that  
7 fair?

8 A I'll take your word on that. I can't see  
9 the fine print.

10 Q You can't see the fine print that's  
11 involved in there?

12 A But if you say it's the same.

13 Q Would you care to step down so you can  
14 see?

15 MR. McSHANE: With permission, I would  
16 like the witness to use this microphone so he  
17 doesn't intrude the Court's vision.

18 THE COURT: Frankly, I'm not sure what  
19 purpose the screen has. We're all looking at a  
20 legible copy provided to me and the witness and  
21 you're holding in your hand.

22 MR. McSHANE: Okay. I mean -- we can do  
23 it that way.

24 THE COURT: I appreciate it if the jury  
25 was present.

1 MR. McSHANE: That's a fair point.

2 BY MR. McSHANE:

3 Q Taking a look at Exhibit No. 46 in front  
4 of you, this person LaQuan Williams was  
5 ostensibly who you identified as an alternative  
6 suspect.

7 A Yes.

8 Q Your first decision was whether or not to  
9 call him as a witness. That was one of your  
10 decisions that you made at the trial, correct?

11 A Yes.

12 Q You did not call him as a witness in this  
13 trial?

14 A No.

15 Q In doing so the jury heard no information  
16 with respect to his point of view or any of his  
17 statements; is that a fair consequence?

18 A Yes.

19 Q All right. Now, the alternative  
20 decision was that you could have called him as a  
21 witness, correct?

22 A Yes.

23 Q And, in fact, you knew where he was at  
24 that point in time. He was in prison, was he  
25 not?

1 A He was in prison somewhere in New York.

2 Q And that somewhere, you had been provided  
3 information because you had a hearing before the  
4 Court on the motion in limina where that  
5 information was revealed, correct?

6 A I recall the hearing. I mean, what  
7 information was revealed, I don't remember.

8 Q But you know that he was in the New York  
9 state system at some point in time. Where  
10 exactly he was, in your recollection today, you  
11 don't recall.

12 A I don't recall whether it was a New York  
13 local detention or whether he was in the state  
14 facility. I don't recall today.

15 Q At the time you had information as far as  
16 where he was?

17 A I believe so. I can't attest to that 100  
18 percent. I don't believe so.

19 Q To secure his appearance you're aware of  
20 what's called the Uniform Act that was applicable  
21 in New York as a party, correct?

22 A Yes.

23 Q Do you know if securing him as a witness  
24 was an option to you on the date of trial, true?

25 A It was a possibility.

1 Q Now, if we could go through some of the  
2 decisions -- points. Had you called him as a  
3 witness to -- examine your trial strategy, let's  
4 do that together. If you had called him as a  
5 witness, one of three things could have happened  
6 in terms of your questioning. The first being,  
7 he could have asserted his Fifth Amendment,  
8 correct?

9 A Of course.

10 Q And if he had asserted his Fifth  
11 Amendment, you're aware based on your training,  
12 knowledge and experience and years of trial work,  
13 he could be declared unavailable, correct?

14 A Under most conditions, yes.

15 Q Specifically if he came in front of the  
16 Court with or without the presence of the jury  
17 and refused to say anything or otherwise asserted  
18 his Fifth Amendment, you could have asked the  
19 Court to grant him immunity, true?

20 A I don't know if I can ask the Court to  
21 grant him immunity. I mean --

22 Q You never heard the practice of  
23 petitioning the Court for it to do a special  
24 transaction on immunity for the purposes of a  
25 trial?

1      **A** I suppose it's possible.

2      Q And you could have asked the District  
3 Attorney to grant him immunity?

4      **A** Yeah, more logically, yes.

5      Q And neither one of those two you pursued  
6 because obviously you had not called him as a  
7 witness, true?

8      **A** Accurate.

9      Q In terms of the Fifth Amendment, if all  
10 of those efforts had failed, you could have  
11 declared him unavailable by the Court much like  
12 the one other key Commonwealth witness who was  
13 declared unavailable in this case, correct?

14     **A** Are you talking about Ms. Cruz?

15     Q Yes.

16     **A** I don't know. That's apples and oranges.  
17 There was a prior statement taken under oath,  
18 full and fair cross examination, and I think that  
19 had more bearing on that statement coming in than  
20 any generalized statement to another third party  
21 coming in.

22 The Rules of Evidence -- there are  
23 different Rules of Evidence and the statute  
24 treats it differently as to why Guillermina  
25 Cruz's statement came in versus any other

1      Q And you have written briefs before. In  
2 fact, you're the chief of the appellate division  
3 in the Dauphin County Public Defender's office.

4      **A** It's not a formal title. I'm a chief  
5 deputy who happens to supervise the appeals.

6      Q So by way of kind of a de facto without a  
7 proper title, you're, for lack of a better way of  
8 putting it, the appeals person or appeal guru in  
9 that office or thought --

10     **A** I'm the person who oversees the appeals.

11     Q On appeals you argue admissibility of  
12 evidence as an appellate issue?

13     **A** I'm sure I have.

14     Q And you reviewed specifically the Rules  
15 on hearsay, specifically going from Pennsylvania  
16 Rules of Evidence 801 through 809; is that fair?

17     **A** I'm sure I have.

18     Q And that was all within your skill set.  
19 At the time of this trial you had that knowledge  
20 level, correct?

21     **A** I mean, I had a knowledge level of the  
22 Rules of Evidence.

23     Q Right.

24     **A** Every attorney does to a certain extent.

25     Q You don't mean to say you're unfamiliar

1      **statement coming in.**

2      Q I want to focus on being declared  
3 unavailable. Any question of unavailability to  
4 you was based upon your knowledge, training and  
5 experience at the time or even now that question  
6 of unavailability by invoking one's Fifth  
7 Amendment rights pursuant to the Rules of  
8 Evidence is a classical scale of being declared  
9 unavailable, true?

10     **A** Yes.

11     Q And Ms. Cruz was also, over your  
12 objection, declared unavailable?

13     **A** Yes.

14     Q So you were aware of the concept of  
15 unavailability, correct?

16     **A** In that circumstance, yes.

17     Q You had mentioned there's a difference  
18 between being declared unavailable and  
19 admissibility, of course, correct?

20     **A** Yes.

21     Q And in terms of your familiarity with the  
22 Rules of Evidence as a practicing attorney for  
23 many years with a very good reputation, you're,  
24 of course, aware of the Rules of Evidence?

25     **A** Yes.

1      with the Rules of Evidence in particular hearsay?

2      **A** I'm not going to hold myself out as  
3 Edward Ohlbaum. As most general practicing  
4 attorneys, I have familiarity with the Rules of  
5 Evidence in certain situations and it's something  
6 that has to be referred to often to address each  
7 situation.

8      Q Good point. But you have books including  
9 Ohlbaum on evidence, correct?

10     **A** Yes.

11     Q Packle and Poulin on evidence, a black  
12 book.

13     **A** Yeah. I mean, we did at one point, but,  
14 I mean, still do now. I don't know.

15     Q And you've gone to updates and CLE  
16 training where hearsay has been discussed before?

17     **A** A couple of times.

18     Q PACDL, the Pennsylvania Association of  
19 Criminal Defense Lawyers, you're a member?

20     **A** Am I a member?

21     Q Um-hum.

22     **A** Yes, every member of our office is a  
23 member.

24     Q You're on their list, sir?

25     **A** I am now.

1 Q But not at the time of trial?  
 2 A **Back in 2005?**  
 3 Q Yes.  
 4 A **No, I seriously doubt it.**  
 5 Q One of the rules of hearsay is Rule 804.  
 6 You're aware of that rule, its existence?  
 7 A **Yes.**  
 8 Q There's a definitional component in there  
 9 that states the definition of unavailability as a  
 10 witness, and it has specific and enumerated  
 11 consequences or circumstances rather where one  
 12 can be declared unavailable?  
 13 A **Okay.**  
 14 Q Is that true? Would it refresh your  
 15 recollection to take a look?  
 16 A **Yes.**  
 17 Q Drawing your attention to 804-A and its  
 18 sequential parts. Let me know when you have  
 19 finished reviewing it, sir.  
 20 A **Okay.**  
 21 Q So 804, as you just took a look at, has a  
 22 definitional component including in A with its  
 23 subsection.  
 24 A **Delineating what kind of hearsay  
 25 statements are admissible if the declarant is**

17

1 **declared unavailable and, of course, it gives an  
 2 itemized list of what kind of statements are  
 3 admissible.**  
 4 Q One of the specific ones is under --  
 5 MR. McSHANE: The Court's indulgence.  
 6 BY MR. McSHANE:  
 7 Q In your possession as we established the  
 8 last time was the statements attributed to Kazar  
 9 by other individuals, correct, meaning  
 10 confessions?  
 11 A **Or was a confession or statement against  
 12 interest?**  
 13 Q Yes.  
 14 A **Okay.**  
 15 Q Because you have used that phrase, you're  
 16 aware of hearsay Section 804 Sub 3, which is a  
 17 statement against interest, correct?  
 18 A **There's a statement against interest  
 19 that's also qualified as to how and when but  
 20 yeah.**  
 21 Q You're aware of the concept of that at  
 22 least at the time of trial?  
 23 A **Yeah.**  
 24 Q And you didn't petition the Court or ask  
 25 the Court to at any point in time to have those

18

1 statements that we've been talking about admitted  
 2 into evidence because you didn't have Kazar?  
 3 A **Not without Kazar being here, no.**  
 4 Q You'll agree -- strike that. If you  
 5 don't ask the Court, then the Court is generally  
 6 not sua sponte going to allow it into evidence;  
 7 is that fair to say?  
 8 A **I don't know if that's a question.**  
 9 Q Here's a question, if you don't ask, you  
 10 won't get. Is that a fair statement?  
 11 A **That's a fair statement in life.**  
 12 Q And so the next decision that you had in  
 13 this decision making tree is if you had called  
 14 him as a witness, the second option is that he  
 15 could have denied, I imagine, because your  
 16 previous announced trial strategy was to blame  
 17 Kazar, LaQuan Williams. You'll confirm that  
 18 again.  
 19 A **Yes.**  
 20 Q Part of that would have been some sort of  
 21 confrontation. Had he been here, you killed the  
 22 decedent not Mr. Love, right?  
 23 A **Ideally, yeah.**  
 24 Q He could have, like we had established,  
 25 taken the Fifth Amendment over that type of

19

1 question. We just went through the exercise,  
 2 went along with that, and the second option he  
 3 could have flat out denied killing her. Is that  
 4 true?  
 5 A **Possibility.**  
 6 Q And, in fact, implicated Mr. Love as the  
 7 sole and exclusive person in becoming all of a  
 8 sudden a new eyewitness to the event. That's a  
 9 possibility as well, correct?  
 10 A **That was one of the possibilities. I  
 11 think I mentioned the last time the other  
 12 possibility. He had given a statement where he  
 13 was going to explain under those circumstances  
 14 how the victim's blood ended up on him from a  
 15 previous altercation between Mr. Love and the  
 16 victim.**  
 17 Q Which already came into evidence at the  
 18 trial in any regard.  
 19 A **No, it didn't.**  
 20 Q The blood on the shoe did.  
 21 A **But not the alternative that he was there  
 22 because Tyshaunt had struck the victim earlier in  
 23 the presence of Kazar, only by separating them  
 24 that the blood got on his boot. That would have  
 25 been his explanation because of the DNA and blood**

1 **on his boot.**

2 Q You feel based upon your experience that  
3 you had, you were utterly incapable of  
4 cross-examining the gentleman under those  
5 circumstances in that context to develop his  
6 bias, his motive and the incredibility of that  
7 explanation?

8 **A I don't think I would have been incapable**  
9 **of cross-examining him. I'm not sure. It's a**  
10 **credible statement. I think a pretty plausible**  
11 **statement in front of a jury to hear that after**  
12 **hearing everything else.**

13 **So, you know, you can sit here all this**  
14 **time later and say because how things turned out**  
15 **it would have, you know, just been an incredible**  
16 **statement on his behalf. At the time that's not**  
17 **how we viewed it would have been. We viewed it**  
18 **would have been bad for us to have him explain**  
19 **how the blood got on him.**

20 Q But the prosecution's theory of this case  
21 was that Mr. Love was a jilted lover who was  
22 angry and upset to the point where he became  
23 homicidal. That was their basic general theory  
24 of the case. Is that fair?

25 **A In the theory of that and the drug**

1 always in response to questioning, later  
2 questioning by the detectives involved in the  
3 investigation of this matter, true? They just  
4 didn't voluntarily show up and say, hey, I want  
5 to take back my statement I gave to you guys  
6 months ago. It was always in response to  
7 Detective Heffner showing up and reinterviewing  
8 the witnesses, fair?

9 **A Probably.**

10 Q And in terms of cross examination and  
11 skills, you could have developed a line of  
12 questioning to reveal that arguable convenience  
13 that occurred.

14 **A What convenience? I don't understand.**

15 Q That they changed their statements after  
16 an identified suspect, after questioning by  
17 Detective Heffner.

18 **A Tyshaunt was an identified suspect also**  
19 **from the get-go.**

20 Q I'm sorry. Charged suspect.

21 **A He had been a charged suspect over the**  
22 **period of time as well. There was no mystery to**  
23 **those people that gave the statements that**  
24 **Tyshaunt was the suspect and Tyshaunt had been**  
25 **charged several times over the course of the**

1 **dealing that was going on.**

2 Q But there was that component of the  
3 jilted lover scenario, come to play out during  
4 openings and closings and had been brought up  
5 throughout periods of time in the trial by  
6 various witnesses, fair?

7 **A I guess.**

8 Q Now, if he had denied -- I'm going back  
9 to LaQuan Williams -- denied killing her, then  
10 the statement that he had given to others could  
11 have been statements that could have been used in  
12 terms of impeachment or statement against  
13 personal interest at least argued that way by  
14 you, correct?

15 **A Under the rules?**

16 Q Yes.

17 **A Certainly one could have been.**

18 Q But those certain ones that could have  
19 been were not advanced to the jury in this case  
20 because LaQuan Williams wasn't present.

21 **A Right. As I mentioned before, there were**  
22 **certain ones where those witnesses who gave**  
23 **incriminating statements then retracted them**  
24 **which also would come out as well.**

25 Q The circumstances of the retractions were

1 **previous at that time five years, six years,**  
2 **seven years, whatever.**

3 Q But it was always in response to  
4 Detective Heffner going back to these witnesses  
5 that these people recanted and said that their  
6 previous story had not been the truth.

7 **A Some of them, yes.**

8 Q And in terms of the theme of cross  
9 examination that you could have developed and, in  
10 fact, you probably have developed in the past is  
11 along the lines of something akin to precisely  
12 that the timing of the recantation and the  
13 authority of the police officer, that's something  
14 you could have developed in terms of cross  
15 examination.

16 **A Anything is possible.**

17 Q Okay. It's within your skill set at the  
18 time?

19 **A Sure.**

20 Q And then the third alternative that could  
21 have happened, if you called him as a witness he  
22 could have admitted it?

23 **A We're talking about Kazar?**

24 Q Yes. It's possible.

25 **A Anything is possible.**

1 Q But you didn't know because you never or  
 2 your staff or no one from the Public Defender's  
 3 office ever interviewed the man at any point in  
 4 time, correct?

5 A **No, we didn't.**

6 Q You relied upon the police officers'  
 7 reports, correct?

8 A **And our attempts to get in contact with  
 9 him. We weren't able to at the time.**

10 Q But in terms of the attempts that were  
 11 made, who made those attempts?

12 A **It would have been -- probably started  
 13 with Monica Cliatt in locating him, and after she  
 14 left it would have gone to Mr. Giunta and one of  
 15 the investigators who made the efforts to find  
 16 out what prison he was at and whether phone calls  
 17 could have been made at that point and who his  
 18 attorney was, I believe.**

19 Q But in terms of all that, you didn't  
 20 directly try and contact Kazar, did you?

21 A **We were not successful in contacting him,  
 22 no.**

23 Q I understand we. But you, you  
 24 specifically weren't able to contact him?

25 A **No, I did not have contact with Kazar.**

1 was a series of decisions as far as what you  
 2 could have done with respect to the forensic  
 3 evidence. You'll concede that.

4 A **Okay.**

5 Q One of the decisions that you had in  
 6 front of you was with respect to DNA testing  
 7 specifically of the blood that was found on  
 8 Kazar.

9 A **Yes.**

10 Q The blood in terms of the examination of  
 11 where the DNA was sampled from, did you ever take  
 12 a look at the surfaces of the items or anything  
 13 that had to do with where that sampling of the  
 14 DNA could have been provided?

15 A **I'm not sure. If you can be more  
 16 specific.**

17 Q Kazar had blood on him.

18 A **Yes.**

19 Q Your recollection is that the blood was  
 20 on his boot and, otherwise, about his person,  
 21 correct?

22 A **Yes.**

23 Q The sampling that you got back from the  
 24 Pennsylvania State Police lab was a conclusion  
 25 that the decedent's blood was on his shoe,

1 Q How did you personally try to contact  
 2 him?

3 A **I didn't. The others were doing that.**

4 Q In terms of the likely -- had Kazar  
 5 admitted to being either part of the homicide or  
 6 the actual perpetrator of the homicide, you would  
 7 agree that would have fundamentally been great  
 8 evidence on behalf of the accused in this case,  
 9 true?

10 A **Yes.**

11 Q The second decision that you had to make  
 12 had to do with some of the forensic evidence that  
 13 was possibly available in this case. You'll  
 14 recognize that there was a series of decisions  
 15 that you made with respect to whether or not you  
 16 would attempt to do any sort of forensic related  
 17 testimony, correct?

18 A **You'll have to repeat that.**

19 Q Sure. There was a second series of  
 20 decisions that you made that had to do with the  
 21 investigation of this case in preparation of  
 22 trial.

23 A **Okay.**

24 Q That included taking a look at forensic  
 25 evidence or examining forensic evidence. There

1 correct?

2 A **Yes.**

3 Q But not on his person. The blood that  
 4 was on his person was not due to the decedent.

5 Do you recall --

6 A **I recall it wasn't the decedent's. I  
 7 don't recall if they said it was his own blood or  
 8 it was blood at all. I don't recall.**

9 Q In terms of DNA sampling that occurs, you  
 10 recognize that when you go to sample DNA, you  
 11 don't sample the entire possible contributing  
 12 source. Instead you do sample selection. You  
 13 look at one specific area of the contribution.  
 14 Do you realize that?

15 A **I don't know if I would realize that back  
 16 when this occurred.**

17 Q Now, with your experience, you do realize  
 18 that, correct?

19 A **A little more. I'm still -- I'm not  
 20 going to claim to be an expert.**

21 Q Did you take a look at Kazar's clothes or  
 22 any of the seized items that had to do with  
 23 Kazar?

24 A **You mean in person?**

25 Q Yes.

1     **A** Like I mentioned the last time we were at  
 2 this hearing, we generally at some point go over  
 3 the evidence in the evidence room and look  
 4 through the things. I have a vague recollection  
 5 of doing that in this case. I remember seeing  
 6 the blood before they were brought to evidence,  
 7 and there was a jacket of some sort that was  
 8 pulled out and marked at some point. I'm not a  
 9 hundred percent sure but we looked at --

10    **Q** You didn't seek to examine the source of  
 11 the sample selection that yielded the  
 12 Pennsylvania State Police conclusions?

13    **A** Which sample selections? All of them?

14    **Q** All of them.

15    **A** No.

16    **Q** You don't know how many sample selections  
 17 were done in the contributing areas.

18    **A** I don't recall.

19    **Q** You're aware of the concept which is  
 20 called random sampling error where if you have a  
 21 pool of evidence, in our case blood, and you only  
 22 take a sample from one specific place, it may not  
 23 necessarily mean that it is that throughout the  
 24 entire sample.

25    **A** I'm aware of that concept. Whether --

1     **A** Correct.

2     **Q** And because you didn't do it in terms of  
 3 the overall examination of the total blood  
 4 sources, it is unknown to us whether or not there  
 5 is that random sampling error at this point,  
 6 fair?

7     **A** I can't answer that. I don't know.

8     **Q** You don't know. Okay. But you could  
 9 have asked to have more expansive testing done.  
 10 That was a decision you could have made, correct?

11    **A** Sure.

12    **Q** And if you had done that, there's  
 13 basically three outcomes that could have come:

14    **Q** That the Pennsylvania State Police conclusion  
 15 that the other area of blood was not hers. That  
 16 was one outcome that could have come, in other  
 17 words, confirming the Pennsylvania State Police  
 18 conclusion.

19    **A** Okay.

20    **Q** And the second outcome could have been  
 21 that the other blood, because of random sampling  
 22 error, could have been hers. You perceive that's  
 23 a possibility?

24    **A** I guess.

25    **Q** The third one is that the blood could

1 once again if you're asking me did I have that  
 2 knowledge, was I aware of that five or six years  
 3 ago, I can't honestly tell you.

4     **Q** You were aware at the time that there was  
 5 some blood, correct?

6     **A** Um-hum.

7     **Q** And you knew that there was some on his  
 8 shoe that had to do with the decedent.

9     **A** Yes.

10    **Q** You recognize that as being an important  
 11 part of the theory of your case, correct?

12    **A** Yes.

13    **Q** You have another contributing area where  
 14 there was blood, but a single piece of paper from  
 15 the Pennsylvania State Police saying that at the  
 16 very least that blood that was sampled in some  
 17 unknown way was not dutifully sent. That was  
 18 what you had at the time.

19    **A** If that was in the report, yes.

20    **Q** You could have sought to have that, all  
 21 of those potential sampling areas to have tested  
 22 by either the Pennsylvania State Police or an  
 23 independent lab. That was an option, wasn't it?

24    **A** Yes.

25    **Q** It was an option that you did not pursue?

1 have came from another source or another person  
 2 yet unidentified. That's a third possibility,  
 3 correct?

4     **A** I guess with blood anything is a  
 5 possibility.

6     **Q** Right. So if it comes back in terms of  
 7 trial strategy in expansive DNA testing that that  
 8 other blood that occurred was not hers, meaning,  
 9 the decedent's, that would have confirmed the  
 10 Pennsylvania State Police conclusion and you  
 11 would have been no worse off in terms of your  
 12 trial strategy.

13    **A** Probably.

14    **Q** If it had come back that the Pennsylvania  
 15 State Police due to their sample selection or  
 16 their methodology had missed a part of that  
 17 contributing blood source of being hers, in fact  
 18 hers, meaning, the decedent's, that would have  
 19 helped your case, would it not?

20    **A** Which blood source?

21    **Q** I'm sorry. The one that they said --  
 22 there's two blood sources on the shoe and  
 23 everything else that wasn't on the shoe. I want  
 24 to concentrate on that part that wasn't on the  
 25 shoe with this line of questioning.

1      **A** **Where was that?**  
 2      Q On the pants I believe.  
 3      **A** **Whose pants?**  
 4      Q Kazar's.  
 5      **A** **Okay.**  
 6      Q That exclusion that occurred with the  
 7      Pennsylvania State Police due to random sampling  
 8      or improper procedure being followed or whatever,  
 9      independent testing possibly could have came back  
 10     with the fact that it was, in fact, her blood,  
 11     meaning, the decedent's blood or a portion of  
 12     that blood was the decedent's blood. That's a  
 13     possibility, wasn't it?  
 14     **A** **Anything is a possibility.**  
 15     Q And in terms of the -- if it had came  
 16     back from independent testing or reanalysis or  
 17     further expansive DNA testing that, in fact,  
 18     there had been blood on his pants, Kazar's pants,  
 19     that would have helped your theory of the case,  
 20     true?  
 21     **A** **If it had been her blood?**  
 22     Q Her blood.  
 23     **A** **Yes.**  
 24     Q The other option, that there was an  
 25     unidentified third person that was on this

1      performed the autopsy, had seen something that he  
 2      believed was a bite mark. Do you recollect that?  
 3      **A** **I don't recall that today, but if it was**  
 4      **there, it was there.**  
 5      Q If there had been evidence of that in his  
 6      autopsy report, you could have called in a  
 7      specialist, an expert known as a forensic  
 8      odontologist, correct?  
 9      **A** **We could have. It is not much of a**  
 10     **developed field especially back then.**  
 11     Q The NAS report, National Academy of  
 12     Science report that exposed that particular --  
 13     the deficiencies, pattern recognition and  
 14     forensic odontologist had not been pushed until  
 15     February of 2009, true?  
 16     **A** **That's not what I'm referring to. I'm**  
 17     **referring to the fact that in a previous homicide**  
 18     **also involving a bite mark, I had an extensive**  
 19     **consultation with a forensic odontologist in New**  
 20     **Jersey and the samplings and what was needed and**  
 21     **what I learned from that --**  
 22     Q Let's talk --  
 23     **A** **-- it was not considered a reliable**  
 24     **science.**  
 25     Q Well, the prosecution in that case sought

1      non-blood source that was there that he had been  
 2      talking about. If there was a third person that  
 3      wouldn't have hurt your case by any stretch of  
 4      the imagination.  
 5      **A** **Information it wasn't Tyshaunt.**  
 6      Q That's why I say third unidentified  
 7      person, right?  
 8      **A** **I don't know if it would have helped or**  
 9      **hurt. I don't know.**  
 10     Q Okay. But certainly it wouldn't have  
 11     hurt if it was a third person's not Tyshaunt's,  
 12     not the decedent's and not Kazar's blood, I  
 13     guess, a fourth person's blood couldn't have hurt  
 14     your case.  
 15     **A** **I don't know. Without reviewing**  
 16     **everything again, looking at the possibility and**  
 17     **trial strategies, I don't know if a fourth**  
 18     **person, what possibilities would have opened up**  
 19     **to either side in that case. I really can't**  
 20     **answer that.**  
 21     Q There was a bite mark on the decedent.  
 22     Do you remember the bite mark?  
 23     **A** **Vaguely.**  
 24     Q There was this source of evidence from  
 25     Wayne Ross, the pathologist, the person who

1      to bring in bite mark evidence that had -- that  
 2      is why you consulted with this other evidence,  
 3      correct?  
 4      **A** **In the other case?**  
 5      Q Yes.  
 6      **A** **Yes.**  
 7      Q And, in fact, in that other case the  
 8      prosecution was allowed to bring in forensic  
 9      odontology results, true?  
 10     **A** **No.**  
 11     Q They were excluded from doing so?  
 12     **A** **They never did it.**  
 13     Q We don't have a court related Frye motion  
 14     that you filed?  
 15     **A** **No.**  
 16     Q And you're aware that even today forensic  
 17     odontology, even though it's under attack, is  
 18     allowed to be presented in court even in  
 19     Pennsylvania?  
 20     **A** **I'll take your word for it. I don't**  
 21     **know. I have not had to deal with it since then.**  
 22     Q You could have researched that, right?  
 23     **A** **Back then?**  
 24     Q Yes.  
 25     **A** **Sure.**

1 Q And your decision in this case was not to  
2 consult a forensic odontologist, correct?

3 A **We did not consult.**

4 Q Like you did with that New Jersey  
5 individual in the other case.

6 A **Because in that case the District  
7 Attorney had already sent his off to his expert  
8 and we needed to counter.**

9 Q The criticism, as you learned from  
10 talking to that New Jersey consultant, was in the  
11 fact of forensic odontology used as a method of  
12 identification, meaning this bite mark came from  
13 this individual, that's the criticism that you're  
14 aware of?

15 A **I'm not aware if it was identification or  
16 of elimination. I'm not sure where it fell at  
17 that point as to whether there was reliability to  
18 one or the other or neither.**

19 Q You'll conceive it is potentially  
20 exclusionary evidence. For example, if a person  
21 only has four teeth and you have a developed bite  
22 mark, that has certainly, you know, more than  
23 four teeth, it can be used as an exclusionary  
24 device?

25 A **In extreme circumstances possibly.**

1 Q And in this case you did not?

2 A **I'll take your word for it. I don't  
3 recall what, if anything, we did.**

4 Q If you had consulted with a forensic  
5 odontologist, they could have developed and you  
6 could have developed this negative corpus style  
7 argument, correct?

8 A **Maybe, maybe not. I don't know, depends  
9 on the evidence, I guess what they would say.**

10 Q They could tell the proper way of  
11 advancing evidence, preserving the evidence and  
12 analyzing the evidence, correct?

13 A **I mean, conceivable any expert could do  
14 that.**

15 Q And if you had asked -- because you  
16 didn't consult a forensic odontologist and  
17 because it wasn't developed in a negative corpus  
18 sense, the jury didn't hear the significance or  
19 lack of significance of the bite mark in this  
20 particular case from a negative corpus point of  
21 view.

22 A **I don't recall.**

23 Q In terms of consulting with the  
24 odontologist, besides the negative corpus style  
25 argument, the person looking at the photograph

1 Q In this case did you seek to have any  
2 sort of documentation as to the bite mark itself?

3 A **I think we had the autopsy photo as their  
4 evidence of a bite mark, but I don't recall  
5 specifically.**

6 Q Are you familiar with a style of defense  
7 that's called the negative corpus argument you  
8 argue, which is what the police could have done  
9 in order to answer the question?

10 A **Sure. We do it with fingerprints all the  
11 time.**

12 Q In this particular case based upon your  
13 recollection, you'll recall that the -- but for  
14 the picture there was nothing that was developed  
15 in terms of the bite mark. There's no casting  
16 that was done, no imprinting that was done.

17 A **I'll take your word for it. I have not  
18 looked back at the file, that portion of the  
19 file. So I don't know if that's what's in the  
20 evidence. I'll take your word for it.**

21 Q As you have done in the past with  
22 fingerprint analysis, you could have advanced a  
23 negative corpus argument with respect to the  
24 odontology evidence, could you not have?

25 A **Yes.**

1 potentially could have used it much like the four  
2 tooth versus the multiple tooth to exclude?

3 A **Anything is possible.**

4 Q If it had excluded Tyshaunt Love as a  
5 contributing source of that, that could have been  
6 something that you argued to the jury?

7 A **Yes.**

8 Q If the expert was out there that could  
9 have used that information plus an exemplar,  
10 Kazar, LaQuan Williams, identify a match between  
11 the two, that could have helped your case?

12 A **Probably. I don't know.**

13 Q Because you didn't seek to have an  
14 exemplar or consult with the odontologist, that's  
15 unknown to us at this point in time. We're  
16 speculating.

17 A **Yes.**

18 Q So it could have brought about  
19 potentially exculpatory information if that was  
20 possible, fair?

21 A **Anything is possible.**

22 Q The other possibility, you could have  
23 identified Mr. Love as the contributing source of  
24 that bite mark, true?

25 A **Yes.**

1 Q In which case you could have simply not  
 2 called him as a witness, true?  
 3 **A Well, yeah, one would not have called him  
 4 as a witness.**

5 Q Even if that person gave negative  
 6 information, you're in control of calling that  
 7 witness and you just simply would not have called  
 8 him certainly under those circumstances, true?

9 **A No.**

10 Q The next decision that you had to do with  
 11 respect to forensic evidence had to do with  
 12 gunshot residue. In this particular case, of  
 13 course, there were allegations that a handgun was  
 14 used to kill the decedent, true?

15 **A Yes.**

16 Q Developing that negative corpus style of  
 17 argument in this particular case, there was no  
 18 gunshot residue testing that was done on either  
 19 Kazar or Mr. Love. You recollect that.

20 **A I'll take your word for it. I don't  
 21 recall because I also don't recall if either one  
 22 was, you know, apprehended or taken in within the  
 23 applicable period of time. I don't recall.  
 24 Gunshot residue tends to be limited to -- for a  
 25 period of hours. I don't recall if they did it**

1 a house and it being a close contact wound  
 2 involving an automatic weapon would exclude  
 3 gunshot residue being on the perpetrator's body  
 4 or hand.

5 **A I don't recall if there was evidence of  
 6 wearing gloves or anything by that -- by anyone  
 7 during this period of time. I don't know. I  
 8 don't recall.**

9 Q None of the witnesses, is that right,  
 10 involved, in particular Ms. Cruz, had said there  
 11 was any sort of gloves that were used, true?

12 **A I don't recall. The record would have to  
 13 reflect that.**

14 Q In terms of the gunshot residue, had it  
 15 been developed and tested, one of two  
 16 possibilities would have come about with respect  
 17 to these two people, meaning Kazar and Tyshaunt.  
 18 One being that it would have negative results  
 19 towards Mr. Love. That's one possibility,  
 20 correct?

21 **A Um-hum.**

22 Q And that would be a powerful potential  
 23 piece of evidence to exclude him as the shooter  
 24 under these circumstances if one were to believe  
 25 Ms. Cruz, true?

1 **or not.**

2 Q Okay. But we'll let the record speak for  
 3 itself with respect to that. You certainly  
 4 didn't develop a negative corpus style argument  
 5 in terms of the availability of gunshot residue  
 6 testing on either one of those two, true?

7 **A I don't recall if it was addressed.**

8 Q In terms of the possibility of developing  
 9 that negative corpus style of argument, one of  
 10 two things could have occurred either the --  
 11 strike that.

12 With respect to the negative corpus  
 13 argument under those conditions that you believed  
 14 at the time to be applicable, there's no downside  
 15 to arguing to a jury why wasn't gunshot residue  
 16 testing done, correct?

17 **A I guess.**

18 Q Certainly if one is to shoot a gun  
 19 according to the proponents of gunshot residue,  
 20 that would leave trace particles behind that were  
 21 capable of being identified consistent with  
 22 firing a handgun.

23 **A Under certain circumstances, yes.**

24 Q You had no information here that would  
 25 exclude these circumstances being -- being inside

1 **A It would have been a piece of evidence.**  
 2 **Once again, gunshot residue depends if someone  
 3 washes their hands, how long after they are  
 4 tested for the evidence. it would be a piece of  
 5 evidence. I don't know how powerful depending on  
 6 the other circumstances.**

7 Q Let's explore that. You don't mean to  
 8 tell us that the lack of gunshot residue would be  
 9 irrelevant.

10 **A No.**

11 Q It would have relevance?

12 **A Yes.**

13 Q If gunshot residue were present, then  
 14 that would note the possibility that the person  
 15 fired a handgun?

16 **A Yes.**

17 Q And if testing had been done on Kazar and  
 18 had it been available, one of two possibilities  
 19 could have come up. It could be negative,  
 20 correct?

21 **A Yes.**

22 Q In which case you could have used those  
 23 arguments that you just did with respect to this  
 24 case to apply to him, meaning, he could have  
 25 washed his hands, used bleach, and time gone by?

1     **A    Correct.**

2     Q    Or, No. 2, it could have came back  
3    positive for gunshot residue with respect to  
4    Kazar, which would have bolstered your argument  
5    and theory of the case that he had been the  
6    shooter as opposed to Mr. Love?

7     **A    Yes.**

8     Q    There was a piece of information that was  
9    developed by the police that I would like to draw  
10    your attention to next that had to do with Iris's  
11    ring. Do you recollect information with respect  
12    to Kazar when he was arrested being caught in his  
13    possession was Iris's, the decedent, ring?

14    **A    I don't recall at this point. I mean,  
15    was this in your supplemental petition?**

16    Q    Yes.

17    **A    I don't recall.**

18    Q    Let's talk about the ring.

19    **A    Okay.**

20    Q    This ring was identified -- was  
21    identified as being Iris's ring. Do you  
22    recollect that?

23    **A    Vaguely.**

24    Q    Iris, obviously being the decedent.

25    **A    Yes.**

1    jury at all.

2     **A    I'll take your word for it. I don't  
3    recall.**

4     Q    In order to develop that evidence, had  
5    you done so, it would have required nothing other  
6    than calling a police officer who was the person  
7    who had arrested Kazar and inventoried his  
8    person.

9     **A    Calling that person and someone to  
10    identify the ring that knew Iris.**

11    Q    Such as mom.

12    **A    Stepmom or whatever, yes.**

13    Q    Those things could have been done?

14    **A    Yes.**

15    Q    They weren't done in this case?

16    **A    I'll take your word for it. I don't  
17    remember. If that's what the record reflects,  
18    then, no, we didn't develop it.**

19    Q    If you don't call the police officer, you  
20    don't call the stepmom or the mom of Iris, then  
21    the jury never hears that evidence obviously.

22    **A    No.**

23    Q    If you do call them, then the police  
24    officer based upon business records exception  
25    would have had an inventory control sheet that

1     Q    Kazar, your alternative suspect, having  
2    possession of a dead person's ring, after they  
3    are dead with no history of extensive access to  
4    the decedent, meaning, a long standing history,  
5    you see the relevance of that today?

6     **A    Obviously there's relevance.**

7     Q    And the relevance would be that your  
8    alternative suspect had the ring of the decedent  
9    at or around the time after she had been killed,  
10    that's relevant evidence.

11    **A    Okay.**

12    Q    Is that true?

13    **A    Yes.**

14    Q    And the evidence that had been developed  
15    was that this was a ring that she had the habit  
16    and custom of wearing on a daily basis. Do you  
17    remember that?

18    **A    I don't remember that part offhand.**

19    Q    If it had been the case that's something  
20    that was on her 24 hours or nearly 24 hours a  
21    day, you would agree that would be relevant  
22    evidence that would bolster your argument that  
23    Kazar did it, true?

24    **A    Yes.**

25    Q    That wasn't developed in front of the

1    would have verified his or her say so in addition  
2    to their oral testimony, correct?

3     **A    Yes.**

4     Q    The records were available because it was  
5    the Harrisburg Police Department who had arrested  
6    Kazar if you'll recollect.

7     **A    I don't recollect who arrested him, which  
8    department.**

9     Q    If that's the case based upon your past  
10    experience inventory documents are available.

11    **A    Yes.**

12    Q    If you had presented those two witnesses,  
13    the jury would have heard that, correct?

14    **A    Yes.**

15    Q    You would have included that in your  
16    closing statement as a point of significance.

17    **A    Probably.**

18    Q    Your recollection now is you don't recall  
19    whether or not you did.

20    **A    I don't recall.**

21    Q    There's another decision that you made  
22    with respect to calling Carlos Hill, and Carlos  
23    Hill, you'll recollect, gave a statement to  
24    Officer Heffner on September 29, 2000 where he  
25    had stated that Kazar had confessed to him during

1 booking. Do you recollect that general evidence?

2 **A Generally, yeah.**

3 Q Now, you could have called Carlos Hill to  
4 the stand, correct?

5 **A Yes.**

6 Q But you didn't call Carlos Hill to the  
7 stand.

8 **A No, we didn't.**

9 Q And in terms of the decision making that  
10 went along with that, there's no -- rather than  
11 getting into all the details that we did with the  
12 original witness, meaning Kazar, you could have  
13 used the Uniform Act to secure his presence,  
14 correct?

15 **A Whose presence?**

16 Q Carlos Hill.

17 **A Yes.**

18 Q You could have utilized the Uniform Act,  
19 correct, or writ of habeas corpus because he was  
20 in a Pennsylvania prison?

21 **A I was going to say he was in a  
Pennsylvania prison.**

23 Q You could have used the habeas corpus to  
24 secure his presence.

25 **A Yes.**

1 had made a statement against personal interest  
2 along the effects of the bitch got what she  
3 deserved.

4 **A Okay.**

5 Q Now you recall that?

6 **A I recall them being in booking and  
statements being made but then there was  
another --**

9 Q The second statement that occurred was  
10 when Heffner went back after Mr. Love had been  
11 charged and he recanted that original statement  
12 implicating Kazar.

13 **A Yes.**

14 Q In the scenario, we talked about the  
15 Fifth Amendment. He could have been declared  
16 unavailable. Arguably presented an argument to  
17 the Court that it was a statement against  
18 personal interest in conjunction with having  
19 Kazar there having developed -- that's the same  
20 option that could have been available at that  
21 time?

22 **A Regarding Carlos?**

23 Q Yes.

24 **A Being unavailable?**

25 Q Yes.

1 Q You didn't in this case.

2 **A No, I thought we did.**

3 Q He testified at trial?

4 **A No, he didn't. I'm saying I think we did  
5 do a writ to make him available. Whether he was  
6 brought in, I don't recall. There was certainly  
7 a writ done for Carlos Hill.**

8 Q But regardless of that, you didn't call  
9 him to trial.

10 **A No.**

11 Q The other decisions that we talked about  
12 with respect to his options are similar to those  
13 that we already went over in detail with respect  
14 to Kazar. He could have taken the Fifth  
15 Amendment. That was one of his options.

16 **A Yes.**

17 Q He could have contradicted himself and  
18 stuck to the second statement where he repeated  
19 his original confession that Kazar made. That  
20 was another option, correct?

21 **A Going back a step. Carlos's initial  
22 statement -- I'm getting him confused. Carlos's  
23 initial statement was to Detective Heffner.**

24 Q Correct. On September 29, 2000 that  
25 while he was in booking with Kazar, that Kazar

1 **A Yes.**

2 Q If he had taken the Fifth.

3 **A Yes.**

4 Q The other option could have been that you  
5 put him on the stand and he doesn't want to talk.  
6 He doesn't want to talk in favor of the accused,  
7 Mr. Love. He could have said along the lines, I  
8 lied to the police in my first statement and,  
9 therefore, stuck with his second statement that  
10 he gave to Detective Heffner. That's a  
11 possibility, correct?

12 **A Yes.**

13 Q You could have impeached him with his  
14 original statement showing the circumstances  
15 involving the second statement at that time to  
16 make an argument much along the lines we explored  
17 with respect to Kazar, correct?

18 **A Possible.**

19 Q Then the third option could have been  
20 that he basically tells you that what he had  
21 originally told Detective Heffner in terms of the  
22 statement against interest was the truth and that  
23 he was pressured by Detective Heffner to change  
24 his opinion. That's a possibility, correct?

25 **A Sure.**

1 Q All these possibilities were not known as  
 2 far as which way this particular case was going  
 3 to go because neither you or your staff  
 4 personally interviewed Carlos Hill, true?

5 **A I don't think we did. I don't know.**

6 Q I want to talk to you about a group of  
 7 witnesses in terms of your decision making that  
 8 was here. Corey Alston, as you'll recall,  
 9 possibly was the individual to whom Kazar  
 10 supposedly got access to a weapon; that he  
 11 returned it with blood on it. Do you remember  
 12 that type of evidence?

13 **A Yes.**

14 Q And then do you recall Kendra Smith, who  
 15 was the paramour of Corey Alston, who fit into  
 16 developing that story. Do you recall that  
 17 individual?

18 **A Do I recall that from her testifying the  
 19 last time or originally back in '05?**

20 Q Let's do both.

21 **A Okay.**

22 Q Do you recall that in the original trial  
 23 development of that story how Kazar could have  
 24 gotten a weapon and returned it with blood?

25 **A No.**

1 **up as to whether it happened.**

2 Q But you heard her testimony here?

3 **A I heard what she said this year, yes.**

4 Q But in terms of your investigation,  
 5 you're again relying upon solely the police  
 6 officer's written recording of oral statements  
 7 that were given by these two people as opposed to  
 8 an independent investigation by you.

9 **A It's possible with those two that's the  
 10 case.**

11 Q You could have called them as witnesses  
 12 to try to develop that, correct?

13 **A Yeah, I could have called anyone as a  
 14 witness, yeah.**

15 Q Much like the other witnesses, they could  
 16 have taken the Fifth Amendment, true?

17 **A Yes.**

18 Q They could have been declared  
 19 unavailable, arguments that had to do with it,  
 20 like, we talked about before, could have been  
 21 developed but not in this case.

22 **A Yes.**

23 Q The second thing, Corey could have denied  
 24 that the entire incident happened instead of  
 25 invoking his Fifth Amendment in which case you

1 Q You don't dispute that it exists based  
 2 upon your hearing the prior testimony --

3 **A Of...**

4 Q -- of Kendra Smith and Corey Alston the  
 5 last time we were in court.

6 **A The last time, no.**

7 Q In terms of your investigation and your  
 8 office investigation of this matter, you'll  
 9 confirm that neither yourself nor anyone at your  
 10 behest personally interviewed or sought to  
 11 interview Corey Alston or Kendra Smith, true?

12 **A I mean, I don't recall. I don't have all  
 13 those files, but if there's no notes indicating  
 14 they were interviewed, that's a fair assumption.**

15 Q But you called neither of them to trial.

16 **A No, we didn't.**

17 Q Having access to a gun by Kazar and  
 18 returning a gun in the immediate temporal  
 19 proximity to the death of Iris with blood on it,  
 20 you see the relevance to that, to your theory of  
 21 the case that Kazar killed Iris and not -- and  
 22 not Mr. Love?

23 **A I see the relevance except what I recall  
 24 back then, Corey -- Kendra was the one saying  
 25 that Corey was denying and the dates didn't match**

1 could have impeached him with the statements of  
 2 Ms. Smith, true?

3 **A Possibly, depending on how the other  
 4 side --**

5 Q You can impeach --

6 **A -- reacted to Rules of Evidence. I don't  
 7 know.**

8 Q You can impeach anyone with anything,  
 9 correct?

10 **A Yes.**

11 Q So you could have called Kendra Smith and  
 12 had her impeach Corey Alston with his previous  
 13 statements, correct?

14 **A Yes.**

15 Q And we didn't in this case.

16 **A No.**

17 Q Then the other possibility is that Corey  
 18 Alston could have -- could have admitted and  
 19 Kendra Smith backed it up in which case that  
 20 would certainly help out your theory of the case  
 21 that Kazar was the perpetrator of this crime.

22 **A Yes.**

23 Q Finally I would like to talk about Keith  
 24 Herndon who was another witness, and you'll  
 25 recall him as being the individual who had a

1 conversation with Kazar at SCI Greene where it  
 2 was attributed to Kazar something to the effect  
 3 of -- that he did Candi like he did Iris. This  
 4 was a September 19, 2000 statement that was made  
 5 to Mr. Herndon alleged by Kazar. You'll recall  
 6 that as being the context, correct?

7 **A I mean, I know there was some sort of  
 8 mention of that.**

9 Q Based upon your recollection, Candi is  
 10 the victim of his other acts that you had sought  
 11 to bring in but was denied by this Court.

12 **A Yes.**

13 Q So the significance of that statement, I  
 14 do Candi like I do Iris, you see the significance  
 15 of that statement, correct?

16 **A Yes.**

17 Q Now, you didn't call him as a witness in  
 18 this case, correct?

19 **A No.**

20 Q You could have called him.

21 THE COURT: Excuse me a second. I'm a  
 22 little confused. Your exhibit refers to and my  
 23 recollection is triggered by the exhibit which  
 24 says that the statement Keith Herndon or the  
 25 statement regarding that Mr. Herndon either said

1 or heard and my recollection that it was  
 2 represented that he had said during the trial  
 3 that -- maybe I'm confused -- he had said to  
 4 Kazar or someone else that Kazar should do Iris  
 5 or do Candi like he did Iris or whatever and I'm  
 6 confused what the statement actually was. I  
 7 guess I don't recall.

8 MR. McSHANE: Sure. A moment of the  
 9 Court's indulgence.

10 THE COURT: Unless you remember.

11 THE WITNESS: I don't remember.

12 MR. McSHANE: Exhibit 25, Your Honor. A  
 13 moment of the Court's indulgence.

14 BY MR. McSHANE:

15 Q If I may, Your Honor, Exhibit 25 you'll  
 16 see a voluntary statement taken by Donald Heffner  
 17 of one Keith Herndon, and in there, there was a  
 18 question that was asked by the detective, what  
 19 did Kazar say in reference to Iris Fennel? Do  
 20 you see that question?

21 **A Not with your hand there.**

22 Q What did Kazar say in reference to Iris  
 23 Fennel?

24 **A Okay.**

25 Q The response was: He said, his exact

1 words was that he did that and that he should  
 2 have done this girl, Candi, like he did that  
 3 bitch Iris. Is that how it reads?

4 **A Are you asking me?**

5 Q Yes.

6 **A Yes. That was part of it.**

7 Q The significance of that statement as we  
 8 now read it into the record was obvious to you at  
 9 the time you read it.

10 **A Yes.**

11 Q In terms of Keith Herndon he wasn't  
 12 called to trial?

13 **A No.**

14 Q And it was because you couldn't locate  
 15 him or did you try to locate him?

16 **A Tried to locate him. I assumed he -- I  
 17 mean, Keith Herndon has a record as long as my  
 18 arm. So I don't know if he was in jail at the  
 19 time or on the run or whatever.**

20 **My problem with Keith, he's -- I dealt  
 21 with Keith before this case and he's a  
 22 pathological liar. He has crimen falsi longer  
 23 than anyone I met. Presenting him as a witness  
 24 even for something that would seem to be good  
 25 seemed a risk.**

1 **As far as locating him, I don't recall if  
 2 he was in jail or we did a writ or not.**

3 Q Let's talk about his location. If he had  
 4 been in jail much like other witnesses, you could  
 5 have secured his appearance?

6 **A If he was in jail there would have been a  
 7 writ of habeas.**

8 Q If he had been out on the street, you  
 9 could have applied for material witness bail to  
 10 try and get him to come into court?

11 **A If we knew where he was, yes.**

12 Q Or put out an application to the Court  
 13 for material witness bail even if you didn't know  
 14 where he was asking for a warrant to be issued.  
 15 You're aware of that.

16 **A Yes.**

17 Q And your recollection is you don't recall  
 18 which way if any of those two that you took,  
 19 true?

20 **A I thought Keith was in jail, but I don't  
 21 recall. The record will reflect that.**

22 Q In terms of his crimen falsi, crimen  
 23 falsi has to do with -- has to do with the  
 24 witness's credibility and believability.

25 **A Yes.**

1 Q And your concern was that the witness  
 2 would be easily impeached because of his long  
 3 prior crimen falsi.

4 **A My concern was, having represented Keith**  
**5 before and dealt with Keith before, that I knew**  
**6 exactly what kind of witness Keith would have**  
**7 been and the crimen falsi added on top of that I**  
**8 think would have been devastating presenting him**  
**9 as a witness. I think he would have been torn to**  
**10 shreds. He would have come off terrible and**  
**11 whatever we gained, we would have lost.**

12 Q In terms of preparing him as a witness,  
 13 it is your testimony that there's no possible way

14 that you could have prepared him for trial so as  
 15 to alleviate some of those fears?

16 **A That's hypothetical. I don't know.**

17 Q But you didn't try, true?

18 **A I don't recall if we located him or not.**

19 **So I don't know.**

20 Q He comes into court. He testifies  
 21 consistent with the statement we just went over,  
 22 his recorded statement to the police officer.  
 23 Commonwealth argues you can't believe him because  
 24 he got a prior record. That was part of your  
 25 fear in addition to his personality; is that

1 couldn't develop that area of bias because you  
 2 had nothing to offer this witness.

3 **A Under those circumstances, yes.**

4 MR. McSHANE: A moment of the Court's  
 5 indulgence. Thank you, Judge. No further  
 6 questions.

7 THE COURT: Mr. McMurry.

8 MR. McMURRY: Does Mr. Muller need a  
 9 break?

10 THE COURT: Good question.

11 THE WITNESS: I'm fine.

12 THE COURT: Good answer.

13 **CROSS EXAMINATION**

14 BY MR. McMURRY:

15 Q Mr. Muller, I'm going to go through the  
 16 files prepared by Mr. McShane. The allegations  
 17 alleged against you and Mr. Giunta, a discussion  
 18 in regards to -- some of these we already  
 19 covered. I want to move quickly over those.

20 Let's start with the original  
 21 supplemental petition. I believe we covered this  
 22 in fairly great detail, but to summarize, I  
 23 believe -- what was your theory of the case?

1 fair?

2 **A Yes.**

3 Q Let's focus on the argument by the  
 4 Commonwealth that he can't be trusted because of  
 5 his crimen falsi. You have nothing that you  
 6 could personally have offered him that would have  
 7 gained him any sort of favorable treatment in  
 8 prison or treatment in life, true?

9 **A No.**

10 Q The argument that the Commonwealth would  
 11 have made with respect to implicating -- I'm  
 12 sorry. The argument that the Commonwealth would  
 13 have made in advance that you shouldn't trust him  
 14 because he's not trustworthy is a tactic that you  
 15 used as a defense attorney; is that true?

16 **A Yes.**

17 Q But in the case when you're the defense  
 18 attorney, it's in conjunction with the argument  
 19 that the Commonwealth can provide either a  
 20 quality of life change or some sort of benefit  
 21 for the person, correct?

22 **A Sometimes.**

23 Q In terms of developing a bias, true?

24 **A Yes.**

25 Q In this particular case, Commonwealth

1 Let's get to that.

2 **A The theory of the case based on what**  
**3 Mr. Love had told us and what he had told the**  
**4 police in several different statements and then**  
**5 what Iris -- I'm sorry -- Guillermo had**  
**6 presented in her statement was essentially that**  
**7 obviously Kazar was the shooter in this case**  
**8 based on, you know, those various statements.**

9 **In Guillermo's initial statement**  
 10 **talking about seeing Kazar in the apartment or**  
 11 **something to that effect, if I recall correctly,**  
 12 **and the fact that the blood found on Tyshaunt and**  
 13 **on Kazar, LaQuan Williams, whatever was on**  
 14 **Tyshaunt did not match. It was his own blood and**  
 15 **what was on Kazar was the victim's blood. The**  
 16 **fact the only connection to blood was to the**  
 17 **victim was what was on Kazar's boot.**

18 **So I mean, the theory was that obviously**  
 19 **Kazar is the one who killed Iris, and, you know,**  
 20 **we thought we backed that up pretty well with the**  
 21 **time line of when things happened, getting the**  
 22 **phone call, putting something in the oven, not**  
 23 **mentioning who was outside. If it had been**  
 24 **someone she knew, she would have told her mother**  
**or stepmother it was Tyshaunt.**

1        **Those kind of things, that was the  
2 essence of the theory of the case. Whatever  
3 happened between Tyshaunt and Iris as far as  
4 their relationship wasn't -- the end result was  
5 not him killing her. It was Kazar being involved  
6 and Kazar being the shooter in this case.**

7        Q    So basically it was, Mr. Love had nothing  
8 to do with it, someone else did it, and it's most  
9 likely Kazar to wrap it up.

10      **A    Essentially, yes.**

11      Q    And facts pointed to Kazar obviously  
12 forensic, the victim's blood on his shoes and the  
13 fact there was no blood on Mr. Love or the fact  
14 there was none of the victim's blood on him.

15      **A    Yes.**

16      Q    So in regards to that, it's alleged that  
17 you were ineffective for not calling LaQuan  
18 Williams. We've gone through this several times  
19 over the course of the hearing. I believe you  
20 basically said regardless of whether he was  
21 available or unavailable or not, you were not  
22 calling Kazar as a witness; is that correct?

23      **A    That's correct.**

24      Q    And, again, what's the main purpose for  
25 not calling him as a witness regardless of

1        **regarding whether we would be able to get that in  
2 with or without Kazar being here.**

3        Q    The Candi incident, just to clarify,  
4 occurred before Iris's death?

5        **A    Yes. That was a year before.**

6        Q    And this is where it's alleged that  
7 Kazar, your knowledge of it, raped a young lady,  
8 slit her throat and tried to shoot her?

9        **A    I believe so, yes, and ultimately it came  
10 out through the other witnesses that, I mean,  
11 that incident didn't necessarily come out. It  
12 came out that Kazar had a propensity for trying  
13 to strangle women and various other things.**

14      Q    Through the trial through other witnesses  
15 even through cross examination or direct, you  
16 were able to dirty up Kazar even more?

17      **A    Yes.**

18      Q    Let's talk about Kendra Smith. You heard  
19 Ms. Smith testify here at the hearing?

20      **A    Yes.**

21      Q    It's alleged that you were ineffective  
22 for not calling Ms. Smith to the stand in support  
23 of your case. Can you again tell us what that  
24 reason is for not having her participate?

25      **A    I mean, our belief back then in preparing**

1        whether he's available or not?

2        **A    I guess it was two-fold, not wanting to  
3 create his unavailability one way or the other  
4 but also not wanting him to actually show up --  
5 okay -- and tell the jury that the reason her  
6 blood was on his boot was because Tyshaunt had  
7 gotten into a physical fight with the victim  
8 earlier. I don't recall if it was that day or  
9 the day before, whatever the case may be, and in  
10 breaking them up, that Tyshaunt had punched her  
11 in the face and she was bleeding and the blood  
12 from her got on him at that point.**

13       **At least back then that was our theory we  
14 didn't want Kazar as a witness. Okay. I mean,  
15 we made the efforts to find out where he was, his  
16 availability and whether he could be brought in  
17 or not.**

18       **It became a concern during the pretrial  
19 hearing on getting Kazar's prior bad acts in  
20 where this Candi who he had also strangled and  
21 beaten and done very similar things in fact on  
22 the exact same date a year before, whatever,  
23 December 20th, or whatever the date was, under  
24 similar circumstances and there was a lengthy  
25 pretrial hearing in front of Judge Bratton**

1        **the case, I believe was that between her and  
2 Corey Alston and their statements not matching up  
3 as to the gun and where it was and when it was,  
4 that it would be a bigger negative than a  
5 positive.**

6        Q    I believe the last testimony with all of  
7 these witnesses we're talking about here today  
8 and it's been alleged in the petition there were  
9 good points and bad points with each of them, I  
10 think you said each witness cut both ways.

11      **A    All double edge sword.**

12      Q    For every good thing you got, you got  
13 something bad.

14      **A    Yes.**

15      Q    It was more a strategic decision on yours  
16 and Mr. Giunta's part as to figure out which was  
17 the best path of pinning this case on Kazar?

18      **A    The focus was pinned on Kazar, the blood  
19 on Kazar's boot was -- I mean, it certainly  
20 wasn't a slam dunk but it was a really good  
21 issue.**

22      Q    And in reference to that, it would be  
23 fair to say you didn't want to create too much  
24 distraction from that or muddy the waters too  
25 much to get the jury off that focus on your

1 behalf.

2 **A More or less. I think part of the**  
 3 **problem was everyone being an ex-con and**  
 4 **presenting ex-cons to support our theory was a**  
 5 **concern back then if we thought we could advance**  
 6 **the theory without going through that.**

7 Q Let's talk about Keith Herndon. You  
 8 covered that pretty well. The fact that he had a  
 9 long extensive history, you didn't think he would  
 10 do well on the stand based on your prior  
 11 representation of him.

12 There's a couple of other people alleged  
 13 here, Larry Fennel.

14 **A Larry Fennel, we could not find him. We**  
 15 **tracked him finally down to South Carolina. He**  
 16 **moved during the pendency of this case. He had**  
 17 **moved several times starting off when Mr. Batson**  
 18 **had the case originally and Ms. Cliatt had the**  
 19 **case, and then when we got the case our subpoenas**  
 20 **went out and we were told he didn't live at the**  
 21 **locations anymore. The last thing our**  
 22 **investigator was able to find out was he had**  
 23 **possibly moved to South Carolina.**

24 Q Basically Mr. Fennel you couldn't find.

25 **A We couldn't find.**

1 Q It's your recollection Mr. Hill gave two  
 2 statements. One originally would be good for you  
 3 and second one not so good.

4 **A I believe so. I'm getting some of the**  
 5 **witnesses confused. I believe that was an issue.**

6 Q I believe the last time when Detective  
 7 Heffner testified -- I show you Commonwealth  
 8 Exhibit No. 1. I believe Carlos Hill's second  
 9 statement -- take a second to read through that.

10 **A Okay. I guess he's the one who gave the**  
 11 **other statement about Tyshaunt, called Cuzzo,**  
 12 **about being there and being somewhat involved in**  
 13 **the incident.**

14 Q Basically incriminating the statement  
 15 made by Mr. Love while they were in prison and  
 16 while Kazar was there as well, correct?

17 THE COURT: The witness would like a  
 18 break and so would I. We'll take a ten-minute  
 19 recess.

20 (A recess is taken from 10:25 a.m. to  
 21 10:41 a.m.)

22 BY MR. McMURRY:

23 Q Mr. Muller, you had a chance to read  
 24 Commonwealth Exhibit 1.

25 **A I did.**

1 Q What about Anthony Knight or Maurice  
 2 Apkin?

3 **A From what I recall, he was under subpoena**  
 4 **at the various times the trial was pending. When**  
 5 **we finally went to trial, it turned out it was**  
 6 **one of the few times he was not incarcerated**  
 7 **somewhere. He had been released that month or**  
 8 **the month before, I believe, and was not**  
 9 **reincarcerated until several months after the**  
 10 **trial took place, and we were unable to find him.**

11 **He had always been under subpoena.**

12 Q There's another individual, Daelene Saez.

13 **A I think she testified.**

14 Q Carlos Hill we talked about already.

15 **A Yes.**

16 Q In that regard, again, whether he would  
 17 have been available or unavailable, why would you  
 18 not present Mr. Hill?

19 **A I mean, pretty much what I already told**  
 20 **Mr. McShane as to why we considered or didn't**  
 21 **consider him to be a good witness or potential**  
 22 **witness. The Rules of Evidence would get under**  
 23 **him as far as statements of interest against**  
 24 **Kazar and his backtracking, you know, yet again**  
 25 **someone -- a convict.**

1 Q After reading that, that's one of the  
 2 reasons why you would not have called Mr. Hill to  
 3 the stand; is that correct?

4 **A Yes. It references in it his statement**  
 5 **to things Tyshaunt said to him or notes he gave**  
 6 **to give to Kazar.**

7 Q I'm showing you what is marked as Defense  
 8 Exhibit 26, which I believe is Mr. Hill's  
 9 original statement to the police.

10 **A If I could have a moment.**

11 Q Sure.

12 **A Okay.**

13 Q In reading that first statement,  
 14 obviously there's differences between the two.

15 **A Yes.**

16 Q In particular on page 2 of that statement  
 17 back to the question: Did Kazar give you any  
 18 details of the murder? And he went through that  
 19 long paragraph there. There's no mention there  
 20 of any kind of gunshot, right?

21 **A No, no, hitting her on the head.**

22 Q Correct.

23 **A Yes.**

24 Q Is that something that would make a  
 25 difference whether or not you bring Mr. Hill in

1 to testify?  
 2 **A** It didn't match up with the evidence. I  
 3 mean, that would have been an issue whatever  
 4 story he's telling or he told doesn't match the  
 5 evidence that's presented or that is there.

6 Q Let's talk about Linda Gianquitto. What  
 7 about her as a witness?  
 8 **A** That was Mr. Giunta's part of his when we  
 9 split up various aspects of the case. He had the  
 10 Gianquittos. He had contact with them on a  
 11 number of occasions, I believe, and it became  
 12 very clear they were going to be terrible,  
 13 terrible witnesses if we called them.

14 Q Based on your review of their statements  
 15 and review of their -- your interview with them,  
 16 you decided not to call the Gianquittos?

17 **A** For those, yes.

18 Q Floyd Banks?

19 **A** I believe he died.

20 Q He was an individual that was in the cell  
 21 with Mr. Hill at the time. Do you recall?

22 **A** I think Floyd -- I may be getting these  
 23 people mixed up. I thought he died by the time  
 24 we got the case. There were several people  
 25 involved as potential witnesses who had died.

1 **One was a cab driver and I don't remember if that**  
 2 **was Mr. Banks. I'm pretty sure Mr. Banks was**  
 3 **dead.**

4 Q What about an individual by the name of  
 5 pop-pop?

6 **A** No. No one could tell us who it was.

7 **Tyshaunt couldn't tell us who it was. The home,**  
 8 **two different possible addresses Tyshaunt said it**  
 9 **was. One had been torn down, and the other one**  
 10 **there was no -- there was no pop-pop. We could**  
 11 **never figure out who pop-pop was.**

12 Q It's your testimony that you looked at  
 13 all these witnesses and for various reasons that  
 14 you stated -- you're aware of all these  
 15 witnesses?

16 **A** Yes.

17 Q But through your analysis of their  
 18 testimony and their baggage they brought to the  
 19 table, you elected to not call them?

20 **A** For various reasons, yes.

21 Q What about the allegations alleged in the  
 22 initial supplemental petition filed that we dealt  
 23 with here, and the first part of the supplemental  
 24 petition dealt with ineffectiveness or not  
 25 requesting for DNA and blood evidence. I think

1 we've gone through that a lot of this morning.  
 2 First one being the clothing on LaQuan Williams.  
 3 I believe your testimony earlier was you had  
 4 blood on LaQuan Williams?

5 **A** Yes.

6 Q You didn't feel there was any other need  
 7 for that independent test. Hand impressions on  
 8 the victim, I don't know if we got into that.  
 9 Do you recall anything about hand impressions on  
 10 the victim, whether or not you would have got  
 11 forensic analysis done for that?

12 **A** I don't remember.

13 Q As far as independent laboratory evidence  
 14 for additional blood on LaQuan Williams' boots  
 15 and clothing.

16 **A** It was not something that was considered.

17 Q Why was that?

18 **A** I don't know if we even considered it  
 19 back then. I don't know if it was within the  
 20 realm of our understanding as to whether to have  
 21 independent testing for luminol under the  
 22 circumstances.

23 Q Did you find it necessary?

24 **A** Well, no, not with our theory of the  
 25 case.

1 Q We went over the bite mark in reference  
 2 to that. You said you already had previous  
 3 experience with that type of science.

4 **A** Yes.

5 Q You didn't feel comfortable with it.

6 **A** No.

7 Q After that it's also alleged that trial  
 8 counsel failed to make an oral motion to  
 9 reconsider the trial courts ruling on LaQuan's  
 10 prior bad acts, post-sentence motion or direct  
 11 appeal on that same issue. Do you recall that?

12 **A** We argued the issue before the Judge  
 13 under what we thought was the relevant standard  
 14 and issue. We preserved what we thought should  
 15 be preserved and we argued that. I mean --

16 Q Did you appeal on that issue? Do you  
 17 recall?

18 **A** I believe we appealed on the issue of the  
 19 denial of our motion to introduce that evidence.

20 **In regards to what standard we used, I don't**  
 21 **recall. Someone else was involved in writing the**  
 22 **appeal.**

23 Q That record will speak for itself.

24 **A** Yes.

25 Q In regards to that allegation of

1 ineffectiveness, you felt you argued that  
 2 correctly?  
 3 **A Yes, and we did not after being denied,**  
 4 **our motion being denied, we did not re-raise an**  
 5 **oral objection. It was already preserved.**

6 Q For that purpose that you already  
 7 preserved it.

8 **A Yes.**

9 Q The last issue, at least I see in the  
 10 supplemental petition was, it was alleged -- that  
 11 was withdrawn way back -- about not talking to  
 12 Mr. Love about testifying.

13 MR. McSHANE: We withdrew that the first  
 14 day.

15 MR. McMURRY: I had it marked here  
 16 wanting to clarify. We won't -- that's not an  
 17 allegation here.

18 BY MR. McMURRY:

19 Q Those are the only allegations  
 20 specifically that have been alleged against you  
 21 in that regard, Mr. Muller. We went through all  
 22 these scenarios what could have happened, what  
 23 could not have happened.

24 MR. McMURRY: A moment, Judge.  
 25

1 **THE WITNESS: Yes.**  
 2 **THE COURT: -- why again was it that you**  
 3 **wouldn't have wanted to put him in front of the**  
 4 **jury to take a look at him and at least deny it**  
 5 **and then answer some difficult questions.**

6 **THE WITNESS: Because I think our worse**  
 7 **case scenario, he would have been here and he**  
 8 **would not take the Fifth and he would tell the**  
 9 **jury what he told the police, that he had been**  
 10 **there earlier when Tyshaunt was in a physical**  
 11 **altercation with Iris, the victim, and he**  
 12 **assaulted her, and that's how her blood got on**  
 13 **him.**

14 **That explanation doesn't come in unless**  
 15 **he's here to testify and that would have done**  
 16 **away with our theory, you know, we know who the**  
 17 **shooter was, the person with the blood on their**  
 18 **boot, victim's blood on the boot. That was**  
 19 **Kazar.**

20 **It was a judgment call at that time. We**  
 21 **didn't want him here because he would have given**  
 22 **a plausible explanation as to how that blood**  
 23 **ended up on his boot and that came in anyhow.**

24 **The evidence, the DNA evidence of the**  
 25 **victim's blood being on his boot that was**

1 BY MR. McMURRY:

2 Q Going back to your original theory of the  
 3 case and trial strategy -- going back to the  
 4 original theory of the case, the strategy you  
 5 employed during the trial, did you feel that  
 6 everything you did supported that theory?

7 **A Yes.**

8 Q And for reasons of not doing certain  
 9 things was also in support of that theory?

10 **A At the time, yeah, yeah. I think you can**  
 11 **always look back after the fact and, you know,**  
 12 **someone is convicted, what should have been done**  
 13 **or shouldn't have been done at the time going to**  
 14 **trial. Yeah, we felt that was the appropriate**  
 15 **theory.**

16 MR. McMURRY: That is -- that's all the  
 17 questions I have.

18 **THE COURT: Anything else, Mr. McShane?**

19 MR. McSHANE: One moment. Nothing  
 20 further, Your Honor.

21 THE COURT: I want to ask one question,  
 22 Mr. Muller. Tell me again, you knew where -- if  
 23 you knew where Mr. Williams was and he was the  
 24 guy that you were alleging was, under your  
 25 theory, the shooter --

1 confiscated days after this occurred, that was  
 2 part of the evidence that came in regardless of  
 3 whether he testified or not.

4 **THE COURT: All right. Anything else?**

5 MR. McMURRY: Nothing from the  
 6 Commonwealth.

7 MR. McSHANE: Nothing from the Defense.

8 THE COURT: There's no reason why he  
 9 can't move on to other hearings.

10 MR. McSHANE: No, Your Honor.

11 MR. McMURRY: No, Your Honor.

12 MR. McSHANE: We would like to call  
 13 Carlos Hill. As we're doing that, as a matter of  
 14 course, I ask for the admission -- if they  
 15 haven't already been previously admitted -- all  
 16 Defendant identified exhibits up to this point in  
 17 time, 1 through 46.

18 MR. McMURRY: I likewise make the same  
 19 motion at this time, Judge.

20 MR. McSHANE: I have no objection.

21 MR. McMURRY: No objection on  
 22 Mr. McShane's exhibits.

23 THE COURT: They are all admitted.

24 (Whereupon, Commonwealth Exhibit Nos. 1  
 25 and 2 are admitted into the record.)

1 (Whereupon, Defendant Exhibit Nos. 1  
 2 through 46 are admitted into the record.)  
 3 THE COURT: Before you leave, make sure  
 4 the court reporter has marked versions so you  
 5 haven't intentionally walked off with them.

6 MR. McSHANE: Will do.

7 MR. McMURRY: Your Honor, in reference to  
 8 Mr. Hill, I spoke to Mr. McShane, this is the  
 9 same objection we made through these witnesses  
 10 that testified previously as a running objection.  
 11 I want to reiterate it here again in regard to  
 12 Mr. Hill, no substantial compliance with 42  
 13 Subsection 9545(d)(1) in regards to the proffer  
 14 of their testimony.

15 In regard to him being here today as  
 16 outlined by that statute, the Court over the  
 17 objections on the other basis under that regard,  
 18 I wanted our objection noted for this witness  
 19 specifically again.

20 THE COURT: Did you get the numbers of  
 21 the section?

22 THE COURT REPORTER: Yes.

23 THE COURT: Anything to add?

24 MR. McSHANE: Ask the Court to rule  
 25 consistent with its prior rulings.

1 you gave --

2 **A I object. I plead the Fifth.**

3 Q If you let me do the question.

4 **A Everything here on for the record, I  
 5 plead the Fifth.**

6 Q Did you give a statement to Detective  
 7 Heffner at any point in your life?

8 THE COURT: He's already said he's not  
 9 going to answer the questions on the basis of his  
 10 Fifth Amendment.

11 MR. McSHANE: Your Honor, I struggle to  
 12 see how whether or not he had a conversation with  
 13 Detective Heffner could possibly implicate him

14 from a statement that he gave back in the year  
 15 2000 when the statute of limitations even if he  
 16 gave a false report to the police would have been  
 17 only two years.

18 THE COURT: Well, that may well be. I'm  
 19 not his lawyer either. If he's exercising his  
 20 right without counsel here, can't make him  
 21 answer. I'm not going to hold him in contempt  
 22 and have him stay here in our prison when he's  
 23 already doing a sentence in Virginia.

24 MR. McSHANE: Okay. So I would like at  
 25 this point in time to ask the Court to make an

1 THE COURT: I try to do that. Your  
 2 objection is noted and overruled.

3  
 4 CARLOS HILL,  
 5 having been sworn, was examined and testified as  
 6 follows:

7  
 8 DIRECT EXAMINATION

9  
 10 BY MR. McSHANE:

11 Q You are Carlos Hill?

12 **A Yes, sir.**

13 Q You're currently incarcerated in the  
 14 state of Virginia?

15 **A Yes, sir.**

16 Q You're just here on what we call a  
 17 Uniform Act extradition to testify here today.  
 18 Do you know that?

19 **A I know that's what I was called for.**

20 Q And I want to talk to you about the  
 21 events that happened back in around the year  
 22 2000, September 29th. Do you recall talking to  
 23 Detective Donald Heffner?

24 **A I plead the Fifth.**

25 Q Okay, and in terms of the statement that

1 oral motion to instruct the witness to answer the  
 2 questions as applicable. The statute of  
 3 limitations according to the Pennsylvania law  
 4 that he would potentially be subject to is only  
 5 two years. The date of his statement was on  
 6 September 29, 2000.

7 THE COURT: Mr. McShane -- Mr. McMurry.

8 MR. McMURRY: Judge, that's your  
 9 discretion, Mr. Hill exercises his constitutional  
 10 right to remain silent.

11 THE WITNESS: Your Honor, if I may, may I  
 12 speak for the record?

13 THE COURT: I just want to caution you  
 14 that you should be very careful about what you  
 15 say.

16 THE WITNESS: Okay. But I'm pretty  
 17 confident in what I'm going to say.

18 For the record, Mr. McShane never  
 19 contacted me -- I've been in the State of  
 20 Virginia corrections for five years -- about  
 21 being a witness to anything first and foremost.  
 22 Mr. McShane had -- there was a conference call  
 23 set up yesterday with a PI out of his firm,  
 24 whatever. I specifically then did tell  
 25 Mr. McShane I wanted nothing to do with his case.

1 I didn't know nothing about the case. I wasn't  
2 testifying about nothing about the case.

3 MR. McSHANE: Can I ask you questions  
4 based upon that?

5 THE WITNESS: I plead the Fifth to any  
6 question that you ask me.

7 MR. McSHANE: Clearly there's no  
8 implication with respect to what you -- he just  
9 gave us. I ask the Court again to instruct the  
10 witness to answer questions.

11 THE COURT: To the extent you're  
12 talking -- both the witness and private  
13 investigator know all the facts about it. I do  
14 not. I don't know what likely is to come up or  
15 when there's a criminality implicated or  
16 otherwise.

17 MR. McSHANE: I ask the Court to make  
18 this ruling based upon what this witness alleges.

19 THE WITNESS: You can't make me answer  
20 nothing. I never agreed that you putting me on  
21 the stand about anything. How can you just force  
22 me to take the stand.

23 THE COURT: That's what subpoenas are all  
24 about, Mr. Hill. But hold on just a second.

25 Whether or not there was a conference with

1 the right to do that.

2 MR. McSHANE: Right.

3 THE COURT: Either by implication I can't  
4 do that.

5 MR. McSHANE: Maybe if I ask the  
6 questions specifically and then the gentleman  
7 either decides that he wants to take the Fifth  
8 Amendment or not. That way we know what my  
9 intended question would be, the scope of possible  
10 responses that one would reasonably have to the  
11 question and maybe that will give a broader  
12 context rather than just this general question or  
13 this general statement of the Fifth that he's

14 implicating the Fifth. May I proceed with that?

15 THE COURT: Let me have a chat here with  
16 Mr. Hill briefly. Mr. Hill, I want you to  
17 understand no one wants you to be inconvenienced  
18 or held here longer than need be. You do have a  
19 right to refuse to testify if the matter under  
20 inquiry is or may implicate you in some criminal  
21 fashion. That Fifth Amendment right does not  
22 necessarily mean you just can say I don't want to  
23 testify.

24 I think that the testimony that is going  
25 to be elicited is whether or not you have some

1 Mr. Hill and your PI, how is that relevant to the  
2 issues that are being litigated here in this  
3 proceeding, which is whether or not Mr. Muller  
4 and Mr. Giunta were effective counsel in their  
5 representation of Mr. Love back at the time of  
6 trial?

7 MR. McSHANE: Bias against Mr. Love and  
8 also motive to not testify here. He's offering a  
9 specific reason why he's not testifying, and I  
10 think with all due respect, his misunderstanding  
11 of the Fifth Amendment and that the statute of  
12 any conceivable crime based upon this statement  
13 of September 29, 2000, has well passed and he  
14 didn't testify at trial.

15 So, therefore, even perjury would not be  
16 available and in terms of --

17 THE COURT: The underlying crime is  
18 homicide.

19 MR. McSHANE: Correct.

20 THE COURT: How am I to know whether or  
21 not something that you may inquire about could  
22 implicate him in the homicide itself?

23 MR. McSHANE: I wasn't planning --

24 THE COURT: I'm not even asking him if  
25 that's what he's concerned about. I don't have

1 reason why you don't want to testify unrelated to  
2 potential prosecution because it does appear to  
3 me, and I think Mr. McShane would even agree, it  
4 is unlikely that anything that's going to be  
5 asked about bad blood between you and Mr. Love or  
6 you don't like each other or some other such  
7 thing or your conversation with the PI would not  
8 give rise to criminal prosecution.

9 Just so you know, you're correct. We're  
10 not allowed to water board you or to otherwise  
11 force you at the point of a knife or barrel of a  
12 gun to say something. That's true.

13 But the Court does have the ability to  
14 hold you in contempt if you fail to answer  
15 questions that do not violate your Fifth  
16 Amendment rights. That would mean that you would  
17 end up spending a longer period of time at Warden  
18 DeRose's hotel, which I don't think you want to  
19 do, and I think I'm not asking you or saying you  
20 must waive your Fifth Amendment right.

21 If you believe that a question  
22 Mr. McShane may ask causes you to be concerned  
23 your answer may or could be used against you to  
24 implicate you in a crime for which is not already  
25 barred by a statute of limitations, then you can

1 still do that.

2 But I think -- let's hear the questions,  
3 and some of them I think will not -- will be  
4 innocuous and not implicate you in any kind of  
5 crime.

6 THE WITNESS: Okay. If I may please the  
7 Court, I understand clearly what's going on. I  
8 don't think, with all due respect, Your Honor,  
9 you understand what's going on. Mr. McShane  
10 never made an attempt to contact me about these  
11 proceedings. I have the right to plead the Fifth  
12 going into these proceedings. I talked to  
13 Mr. McShane's PI yesterday, and I specifically

14 notified him and told him that I had no  
15 intentions on testifying, taking the stand. I  
16 didn't want nothing to do with the case.

17 THE COURT: That's why we have subpoenas  
18 so that people can't select whether or not they  
19 wish to testify. Your right to raise that is  
20 after the questions are asked not before.

21 THE WITNESS: Do it not matter yesterday  
22 morning my life was put in jeopardy? Do that  
23 matter?

24 THE COURT: I don't know. Why don't we  
25 let him ask the questions.

1 THE WITNESS: I'm pleading the Fifth all  
2 the way out.

3 MR. McSHANE: I think I'm entitled on the  
4 record to ask the questions and have the  
5 gentleman assert the Fifth and then see where it  
6 goes.

7 BY MR. McSHANE:

8 Q The first question that I have to you,  
9 you gave a statement to Donald Heffner on  
10 September 29, 2000, didn't you?

11 A I do not recall.

12 Q If I placed your statement, typed  
13 statement in front of you with your signature and  
14 your initials, that would refresh your  
15 recollection, wouldn't it?

16 THE COURT: Don't ask too many questions.  
17 Just ask one. Show it to him and ask if he would  
18 read it.

19 BY MR. McSHANE:

20 Q Would you be able to recognize your own  
21 signature?

22 A I should, yeah.

23 Q I'm placing in front of you what's marked  
24 down here as Defendant Exhibit 26. Do you see  
25 that mark?

1 A Um-hum.

2 THE COURT: I see it. That's all that  
3 matters.

4 BY MR. McSHANE:

5 Q The last page here, this is your  
6 signature that I'm pointing at where it says  
7 signature of person giving statement. Do you see  
8 that?

9 A Um-hum.

10 Q Is that yes for the record?

11 A Yes.

12 Q Taking a look at these three pages, does  
13 that refresh your recollection that you were

14 interviewed by Detective Heffner on September 29,  
15 2000?

16 A I don't recall.

17 Q You did talk to an Investigator Heffner  
18 about the murder of Iris, correct?

19 A I don't recall.

20 Q I'm placing in front of you what is  
21 marked Defendant Exhibit No. 26. Do you see the  
22 CH that is there?

23 A Yes.

24 Q That's on the first page we're looking at  
25 there.

1 A Yes.

2 Q CH stands for?

3 A I don't know.

4 Q You don't know your own initials?

5 A I just see a CH. That could mean  
6 anything.

7 Q CH happens to correspond with your  
8 initials, Carlos Hill.

9 A Okay.

10 Q The CH that is here, that's your CH,  
11 isn't it?

12 A I don't recall. I don't know.

13 Q This CH here on the second page, that  
14 corresponds to Carlos Hill, doesn't it?

15 A I don't know.

16 Q And on the last page where your signature  
17 is, the CH is also there?

18 A I don't know.

19 Q You don't see a CH there?

20 A No.

21 Q That's right here in front of you. Take  
22 a look at this. Do you see a CH there?

22 A I don't know.

23 Q You don't see a C?

24 A I see a C.

1 Q A period; do you see the period?  
 2 A Um-hum.  
 3 Q Do you see the H?  
 4 A Yeah.  
 5 Q So there's a CH present, correct?  
 6 A **What is your point? Why do you even have me here today? Why have me here today against my will? That's what the question is.**  
 9 Q CH corresponds to?  
 10 A **This is crazy. This is crazy.**  
 11 THE COURT: Mr. Hill, I know we haven't met.  
 13 THE WITNESS: I understand. I'm trying to figure out why he has me here today.  
 15 THE COURT: Here's a rule, when my lips are moving, talking, you don't.  
 17 THE WITNESS: Okay.  
 18 THE COURT: You're here because you've been subpoenaed to answer questions. He has a right to represent his client, to ask you questions.  
 22 THE WITNESS: He's calling me as a witness.  
 24 THE COURT: He has the right to do that.  
 25 That's why we have subpoenas.

1 THE WITNESS: I'm a poor witness.  
 2 THE COURT: Mr. Hill, stop it. Be quiet.  
 3 MR. McSHANE: I'll move on. He's being obstructive. We get the point.  
 5 BY MR. McSHANE:  
 6 Q You gave a statement that you signed that bears at least on the face of it 09-29-2000. Do you see that's how it reads?  
 9 A **Yeah, I see it.**  
 10 Q You did talk to a Detective Heffner. You were in the -- when you were in the adult offenders section of the Harrisburg Police Department. Do you remember that?  
 14 A **I don't recall.**  
 15 Q Do you remember the year?  
 16 THE COURT: Mr. McShane, maybe if you could step back. There's a little invasion of space issue here.  
 19 MR. McSHANE: I only have one copy.  
 20 THE COURT: But the question ultimately is, I believe the detective testified about this statement. It's already been authenticated and admitted. What is it more than you want?  
 24 MR. McSHANE: All right. I'll move on, Judge.

1 THE WITNESS: Okay.  
 2 BY MR. McSHANE:  
 3 Q We're talking about the CH. The CH we just saw on the third page of the document, Defense Exhibit 26, corresponds to Carlos Hill, doesn't it?  
 7 A **I don't know.**  
 8 Q Okay. What you're saying to me is that you don't initial things with a CH.  
 10 A **I mean, right, naturally I would. My name is Carlos Hill. If you're saying that's my initials, that's what you saying?**  
 13 Q I'm asking on these three pages.  
 14 A **I don't recall.**  
 15 Q Taking a look at -- do you know your own initials?  
 17 A **I don't recall. I'm a poor witness. I'm a poor witness.**  
 19 THE COURT: Wait.  
 20 THE WITNESS: I'm a poor witness.  
 21 THE COURT: Wait until he asks the questions -- but before --  
 23 THE WITNESS: I'm a poor witness.  
 24 THE COURT: Get to the relevance. That's already part of this --

1 BY MR. McSHANE:  
 2 Q With respect to the trial that eventually happened, had you ever been questioned by anyone who represented Tyshaunt Love?  
 5 A **I plead the Fifth.**  
 6 MR. McSHANE: **I can't imagine how, Your Honor, this could implicate him in the crime.**  
 8 THE WITNESS: It's not about anything implicating me in a crime. I can't imagine why you would put me on the stand.  
 11 THE COURT: Mr. Hill, when I'm talking, you don't. That's one benefit that I have of sitting up here.  
 14 THE WITNESS: Okay. I apologize.  
 15 THE COURT: That's all right.  
 16 Mr. McShane simply asked whether or not you had spoken to any of those who represented Mr. Love prior to the trial. Which occurred on what date?  
 19 MR. McSHANE: 2005, September of 2005.  
 20 THE COURT: He's just asking whether anyone representing Mr. Love had contacted you.  
 22 THE WITNESS: No.  
 23 BY MR. McSHANE:  
 24 Q Do you know where you were in September of 2005?

1      **A    No.**

2      Q    Were you in prison in 2005?

3      **A    I don't recall.**

4      MR. McSHANE: One moment of the Court's  
5      indulgence. One moment, Your Honor.

6      BY MR. McSHANE:

7      Q    Okay, Mr. Hill, you said your life was  
8      threatened. It was threatened by Kazar, LaQuan  
9      Williams?

10     **A    I plead the Fifth.**

11     Q    You feel that your life is threatened by  
12    testifying here today?

13     **A    I plead the Fifth.**

14     Q    I don't know how that possibly --

15     THE COURT: If that's your feeling,  
16    that's okay.

17     THE WITNESS: I'm just saying yesterday  
18    morning me and Williams got into an altercation.  
19    Had I not been brought up here by you unannounced  
20    out of the clear blue to testify, something that  
21    I didn't want to get involved in or have  
22    knowledge about, I wouldn't have went through  
23    that.

24     So I feel like the altercation I went  
25    through -- right now I'm in segregation because

1      **came at me. For the record I beat his ass.**  
2      **Excuse me, Your Honor, and that was it, blah,**  
3      **blah. But had I not been brought up here to the**  
4      **state of Pennsylvania called by you on a**  
5      **subpoena, I would never got into the altercation.**

6      **THE COURT: And the dude is the guy you**  
7      **said was Williams.**

8      THE WITNESS: Whoever he was.

9      THE COURT: You only heard that.

10     THE WITNESS: I don't know for the  
11    record.

12     MR. McSHANE: I'm fine. I'm done with  
13    it.

14     THE WITNESS: You don't need -- you're  
15    not going to get anywhere with this matter. I'm  
16    not trying to hurt his appeal, whatever is going  
17    on or hurt the family. All I know is, you never  
18    talked to me. I never talked to you. You  
19    shouldn't want to call nobody to witness to  
20    something without prior notification what they  
21    wasn't involved in. It doesn't take a rocket  
22    scientist to know that.

23     MR. McSHANE: I thank you for your  
24    soliloquy and --

25     THE WITNESS: I got a degree in

1      of you, Justin McShane, because of you I'm in the  
2      hole, had I not been brought up here, brought  
3      into this situation. I wasn't called as a  
4      witness at the time of the first trial. I  
5      shouldn't be called as a witness now.

6      BY MR. McSHANE:

7      Q    By Mr. Williams, you mean LaQuan  
8      Williams, correct?

9      **A    I can sit here all day, man.**

10     Q    And I can too. This is the last question  
11    I'm ever going to ask you, Mr. Williams.

12     THE COURT: I'm going to tell you he's a  
13    lawyer.

14     THE WITNESS: He ain't going to lie to  
15    me. The clock keep ticking. I only have a few  
16    more months to do, you know. Time is still  
17    running in Virginia.

18     MR. McSHANE: No one wants that.

19     BY MR. McSHANE:

20     Q    Just one question, the Williams you  
21    referred to is LaQuan Williams?

22     **A    I don't know who he was. I didn't look**  
23    **at the writing.**

24     Q    Mr. Williams was in the prison?

25     **A    I didn't look. They writing. The dude**

1      elementary education for the record.

2      THE COURT: I have to do this.

3      Mr. McMurry, do you have any questions?

4      THE WITNESS: This is crazy.

5      MR. McMURRY: I do briefly, Judge.

6

7      **CROSS EXAMINATION**

8

9      BY MR. McMURRY:

10     Q    In reference to, Mr. Hill, Mr. McShane  
11    asked did anyone contact you at the time of the  
12    trial back in September of 2005 and you said no  
13    to his question. If they would have contacted  
14    you, would you have come and testified for  
15    Mr. Love in his defense?

16     **A    No, I wouldn't have gotten involved in**  
17    **none of this.**

18     MR. McMURRY: Thank you. No further  
19    questions.

20     MR. McSHANE: I don't want to beat a dead  
21    horse.

22     THE COURT: Mr. Hill, thank you very  
23    much.

24     THE WITNESS: Is there any way to get me  
25    back to Virginia corrections? I got a doctor's

1 appointment on Tuesday morning.

2 THE SHERIFF: We'll try.

3 THE COURT: The short answer is, I'm  
4 going to tell them you would like to go back as  
5 soon as you can. The true answer is I do not  
6 control the sheriff's vehicles and their  
7 allocation. If they have no vehicles  
8 available -- they do it as fast as they can.

9 We have no reason to keep you here.

10 There's no benefit to any of us or to you by you  
11 being here. They will do the best they can.

12 THE WITNESS: I'll be filing a civil suit  
13 against Mr. McShane for defamation of character.

14 I'll see you in a few months.

15 MR. McSHANE: Is that a threat, sir?

16 THE WITNESS: I just said I'll see you in  
17 a few months in the courtroom.

18 THE COURT: Anything else?

19 MR. McSHANE: I think I provided enough  
20 entertainment for today.

21 THE COURT: Anything?

22 MR. McMURRY: Judge, in light of the fact  
23 the only witnesses the Commonwealth would have  
24 called would have been Mr. Muller and Mr. Giunta.  
25 Since we were able to examine their testimony

1 3rd -- from today, I'll accept post-hearing memos  
2 in the nature of closing arguments.

3 MR. McSHANE: That's fair.

4 THE COURT: Thank you very much.

5 \* \* \* \*

1 through Mr. McShane calling them as a witness, we  
2 have no testimony to offer during the evidentiary  
3 part of this hearing.

4 THE COURT: I want to make sure I  
5 understand. You know when you are  
6 cross-examining in response to the questioning by  
7 Mr. McShane that limited you to the areas that he  
8 had covered.

9 MR. McMURRY: I understand that.

10 THE COURT: Are you saying that you have  
11 no reason to call them to cover any additional  
12 areas of inquiry?

13 MR. McMURRY: That's correct. I believe  
14 we covered everything we would have asked  
15 directly on cross examination through  
16 Mr. McShane's questions on the record.

17 THE COURT: Now, we spoke then at sidebar  
18 at the beginning of these proceedings today. Is  
19 everyone still on board with the -- what I  
20 thought was the agreement that rather than making  
21 closing arguments here, given that these  
22 proceedings have now extended over a number of  
23 months, that instead we'll get the transcript of  
24 today's proceedings prepared promptly and that 30  
25 days from today -- I gave you a date, December

1

## CERTIFICATE

2

3

4 I hereby certify that the proceedings  
5 and evidence are contained fully and accurately in the  
6 notes taken by me on the hearing of the above cause,  
7 and that this is a correct transcript of the same.

8

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14

15 The foregoing record of the proceedings  
16 of the above cause is hereby approved and directed to  
17 be filed.

18

19

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23

24

25

  
Joanne M. Kohn  
Official Court Reporter

Date

Bruce F. Bratton, Judge